STATE OF MICHIGAN

COURT OF APPEALS

In re JOHNSON/IVESON, Minors.

UNPUBLISHED
May 26, 2015

No. 324633
Kent Circuit Court
Family Division
LC Nos. 13-052786-NA;
13-052787-NA;
13-052788-NA

Before: DONOFRIO, P.J., and O'CONNELL and RONAYNE KRAUSE, JJ.

PER CURIAM.

Respondent-mother appeals as of right the trial court's order terminating her parental rights to the minor children, KJ, RI, and KI, under MCL 712A.19b(3)(c)(*i*) (failure to rectify conditions of adjudication), (g) (failure to provide proper care and custody), and (j) (reasonable likelihood that the children will be harmed if returned to the parent).[1] For the reasons provided below, we affirm.

A trial court must terminate a respondent's parental rights if it finds that (1) a statutory ground under MCL 712A.19b(3) has been established by clear and convincing evidence and (2) a preponderance of the evidence establishes that that termination is in the children's best interests. *In re White*, 303 Mich App 701, 713; 846 NW2d 61 (2014). The trial court terminated respondent's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j), which provide:

> (3) The court may terminate a parent's parental rights to a child if the court finds, by clear and convincing evidence, 1 or more of the following:
>
> * * *

[1] The parental rights to RI and KI's father were also terminated and he has not appealed. The parental rights to KJ's father were also terminated, and this Court affirmed that decision in *In re K Johnson, Minor*, unpublished order of the Court of Appeals, entered March 3, 2015 (Docket No. 324577).

(c) The parent was a respondent in a proceeding brought under this chapter, 182 or more days have elapsed since the issuance of an initial dispositional order, and the court, by clear and convincing evidence finds either of the following:

(*i*) The conditions that led to the adjudication continue to exist and there is no reasonable likelihood that the conditions will be rectified within a reasonable time considering the child's age.

* * *

(g) The parent, without regard to intent, fails to provide proper care or custody for the child and there is no reasonable expectation that the parent will be able to provide proper care and custody within a reasonable time considering the child's age.

* * *

(j) There is a reasonable likelihood, based on the conduct or capacity of the child's parent, that the child will be harmed if he or she is returned to the home of the parent.

I. STATUTORY GROUND

Respondent first argues that the trial court erred in finding that a statutory ground for termination of her parental rights was established. "In order to terminate parental rights, the trial court must find by clear and convincing evidence that at least one of the statutory grounds for termination in MCL 712A.19b(3) has been met." *In re VanDalen*, 293 Mich App 120, 139; 809 NW2d 412 (2011). We review for clear error a trial court's determination that a statutory ground has been proven by clear and convincing evidence. *Id*. "A finding of fact is clearly erroneous if the reviewing court has a definite and firm conviction that a mistake has been committed, giving due regard to the trial court's special opportunity to observe the witnesses." *In re Moss*, 301 Mich App 76, 80; 836 NW2d 182 (2013).

Mother had a history of CPS involvement before these proceedings were initiated. She had been living in a hotel with her boyfriend with whom she had a history of domestic violence in the children's presence. The instant proceedings were initiated after mother was arrested, on August 29, 2013, for driving without an operator's license. She left her children in the care of her boyfriend. On September 3, 2013, while mother was still incarcerated, the children were found wandering around the hotel unsupervised while the boyfriend was asleep in the hotel room. The children were removed at that time. The Initial Service Plan identified parenting skills, domestic relations, and housing, among other things, as mother's primary barriers to reunification. The record reflects that mother never rectified those issues during the course of these proceedings.

First, with respect to mother's deficient parenting skills, mother's participation in parenting time visits during this case was sporadic at best. While she attended the (slight)

majority of her parenting time visits, she also missed numerous visits, either because she was substantially late to the visits or failed to appear at all. Her inconsistency in attending parenting time visits had negative effects on the children, particularly KJ, who on at least one occasion claimed to have been "bad" because mother was not visiting him. During visits mother actually attended, DHS continually noted concerns about mother's parenting skills. Although mother generally had a bond with the children, she was unable to handle all three of them together. The visits were chaotic, with mother often being unable to control KJ's behaviors. The children did not listen to her, which irritated her. She provided excuses for why the children—and KJ in particular—did not listen, such as claiming that KJ had ADHD, although such a diagnoses specifically was rejected by KJ's school and although the foster parents had no trouble getting KJ to listen. Mother often failed to redirect the children, follow through with discipline, adequately supervise them, or properly engage all three of them. In fact, during some visits, mother sat in one spot, while simply directing the children what to do and warning them about the consequences if they did not listen. While mother completed parenting classes in January 2014, the agency did not see any improvements. And, while the agency did see some slight improvement after mother was provided a parenting time specialist, the improvement was not sufficient for the agency to feel comfortable placing the children back in mother's care.

Next, with respect to mother's housing issue, the record clearly demonstrates that mother never rectified that issue. At the time the children were removed, mother was living in a hotel with her boyfriend. Although she was provided ample resources throughout this case in an effort to address this issue, mother refused to follow through and continued living in a hotel at the time of termination. The hotel room did not have enough beds for the children and there was not even a kitchen. Although mother indicated that she could secure a three-bedroom home for the children if they were returned to her, she failed to follow through on securing that home in order to demonstrate that she could provide proper housing.

From the record, mother continually claimed throughout these proceedings that she was no longer residing with the boyfriend, but evidence obtained by the agency as recently as September 2014 indicated otherwise. Also, it is apparent that mother failed to sufficiently participate in or benefit from the services offered and failed to rectify the conditions that led to adjudication. Furthermore, given her pattern of inconsistent attendance at parenting time visits, failure to adequately implement parenting techniques learned through parenting classes and the parenting time specialist, pattern of indifference toward finding suitable housing, and continual refusal to separate from her domestically violent boyfriend (not withstanding a court order to the contrary) there was no reasonable likelihood, at the time of termination, that mother would rectify these issues within a reasonable time such that she could provide proper care and custody for the children. As such, the trial court did not clearly err in finding that clear and convincing evidence supported termination of mother's parental rights under MCL 712A.19b(3)(c)(*i*), (g), and (j).[2]

[2] Of course, only one statutory ground was needed to terminate parental rights. *In re HRC*, 286 Mich App 444, 461; 781 NW2d 105 (2009).

II. BEST INTERESTS

Mother next argues that the trial court erred in finding that termination of her parental rights was in the children's best interests. "Once a statutory ground for termination has been proven, the trial court must find that termination is in the child's best interests before it can terminate parental rights." *In re Olive/Metts*, 297 Mich App 35, 40; 823 NW2d 144 (2012), citing MCL 712A.19b(5). "[W]hether termination of parental rights is in the best interests of the child must be proven by a preponderance of the evidence." *In re Moss*, 301 Mich App at 90. The trial court should weigh all the evidence available to it in determining the child's best interests. *In re Trejo*, 462 Mich 341, 356-357; 612 NW2d 407 (2000). We review the trial court's finding for clear error. *Id*.

The trial court should weigh all the evidence available to it in determining best interests, *Id.* at 356-357, and may consider such factors as "the child's bond to the parent, the parent's parenting ability, the child's need for permanency, stability, and finality, and the advantages of a foster home over the parent's home." *In re Olive/Metts*, 297 Mich App at 41-42 (citations omitted). Other considerations include the length of time the children were in foster care or placed with relatives, the likelihood that the children could be returned to their parent's home "within the foreseeable future, if at all," and the parent's compliance with the case service plan. *In re Frey*, 297 Mich App 242, 248-249; 824 NW2d 569 (2012). The trial court may also consider the parent's visitation history with the children. *In re BZ*, 264 Mich App 286, 301; 690 NW2d 505 (2004).

The record contained sufficient evidence to support, by a preponderance of the evidence, that termination of mother's parental rights was in the children's best interests. At the time of termination, six-year-old KJ, five-year-old RI, and two-year-old KI had spent over one year in foster care because of mother's continued inability—or unwillingness—to address and rectify her many barriers to reunification. Thus, as the trial court recognized, the children desperately needed permanency, stability, and finality, and they deserved to be placed in a foster care home that was willing to adopt them. As discussed above, mother substantially failed to participate in or benefit from the services provided to her, and did not have a suitable home. Moreover, she lacked the ability to adequately parent all three children, and was in fact unable to handle all three children together. It was thus unlikely that the children could be returned to her care "within the foreseeable future, if at all." *In re Frey*, 297 Mich App at 249. Finally, while there is no doubt that mother shared a bond with the children, that bond was undoubtedly diminished by mother's inconsistency in attending parenting time visits, which negatively affected the children. The trial court did not clearly err in finding that termination of mother's parental rights was in the children's best interests.

III. ICWA NOTICE

Mother finally argues that DHS and the trial court failed to comply with the notice requirements of the Indian Child Welfare Act (ICWA), 25 USC 1901 *et seq*. We review this unpreserved issue for plain error affecting substantial rights. *Rivette v Rose-Molina*, 278 Mich App 327, 328; 750 NW2d 603 (2008).

ICWA establishes various substantive and procedural protections where an Indian child[3] is involved in a child protective proceeding. *In re Morris*, 491 Mich 81, 99; 815 NW2d 62 (2012). In pertinent part, the act requires that the relevant Indian tribe be notified via registered mail, return receipt requested, of a proceeding where there is "reason to know" that an Indian child may be involved. 25 USC 1912(a). The "'reason to know' standard for purposes of the notice requirement in 25 USC 1912(a) should set a rather low bar." *In re Morris*, 491 Mich at 105. That is, "sufficiently reliable information of virtually any criteria on which membership might be based is adequate to trigger the notice requirement of 25 USC 1912(a)." *Id*. at 108. A trial court is required to maintain a record of the efforts made to notify Indian tribes; at a minimum, it must ensure that the record includes "(1) the original or a copy of each actual notice personally served or sent via registered mail pursuant to 25 USC 1912(a), and (2) the original or a legible copy of the return receipt or other proof of service showing delivery of the notice." *Id*. at 114. Failure to comply with the ICWA notice requirement mandates conditional reversal so that the trial court can resolve the notice issue. *Id*. at 122.

There is no question that the ICWA notice requirement was triggered early in these proceedings when the father of RI and KI reported possible "Blackfoot Cherokee" heritage through his great-grandfather. See *In re Morris*, 491 Mich at 109 (holding that the ICWA notice provision was triggered when the respondents informed the trial court about possible Indian heritage).

The record indicates that DHS initially sent notifications regarding both RI and KI to Cherokee Nation Indian Child Welfare in Oklahoma and to the Midwest Bureau of Indian Affairs in Minnesota, via registered mail, return receipt requested, around October 21, 2013. The notices identified the children's tribal affiliation as Blackfoot Cherokee, and they provided information about RI and KI's father, his paternal grandfather, paternal grandmother, and paternal great-grandfather. The return receipts are contained in the lower court file; the notices were received by the respective entities on October 23, 2013. On October 30, 2013, DHS received responses from the Bureau of Indian Affairs acknowledging that the Cherokee tribe had been notified but also requesting that DHS notify the Blackfeet tribe in Montana. Subsequently, on November 13, 2013, DHS sent notifications regarding both RI and KI to the Blackfeet Tribe of Montana and to the Bureau of Indiana Affairs, via registered mail, return receipt requested. The notices once again identified the children's tribal affiliation as Blackfoot Cherokee, and provided information about RI and KI's father, his paternal grandfather, paternal grandmother, and paternal great-grandfather. These return receipts are also contained in the lower court file; the notices were received by The Bureau of Indian Affairs on November 20, 2013, and by the

[3] Under ICWA, an "Indian child" is "any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe." 25 USC 1903(4). Additionally, the Michigan Indian Family Preservation Act, MCL 712B.1 *et seq*., more broadly defines "Indian child" to include a child "[e]ligible for membership in an Indian tribe as determined by that Indian tribe," without reference to whether the parent is a member, MCL 712B.3(k)(*ii*).

Blackfeet Tribe on December 2, 2013. On December 5, 2013, DHS received a response from the Bureau of Indian Affairs acknowledging that the Blackfeet Tribe had been notified.

On December 5, 2013, the Cherokee Nation sent DHS a response letter indicating that, based on the information provided, it would not consider RI or KI Indian children for purposes of ICWA. Also on December 5, 2013, the Blackfeet Tribe sent DHS a response letter indicating that it would not consider RI or KI Indian children for purposes of ICWA. Instead of acknowledging these responses, mother erroneously contends in her brief on appeal that no responses were received after November 4, 2013.

In addition to the above notifications, the lower court record contains evidence of additional efforts made by DHS to ascertain whether RI and KI had Indian heritage. Specifically, the record contains a response from the United Keetowah Band of Cherokee Indians in Oklahoma indicating that neither RI nor KI were members, although the lower court record does not contain the original notification sent to that tribe. Additionally, the record contains responses from the Saginaw Chippewa Indian Tribe of Michigan indicating that neither RI nor KI were members or eligible for membership, although the lower court record again does not contain the original notifications sent to that tribe. Finally, the record contains copies of both the notifications to, and a response from, the Nottawaseppi Huron Band of Potawatomi Indians; membership in that tribe was also denied. In addition to the above record evidence, DHS reports indicate that notifications were sent to a plethora of other tribes, and that membership in those tribes was denied.

The record sufficiently evidences DHS's compliance with the ICWA notice requirement. Since no proof of Indian membership was shown, the burden shifted to mother and the other respondents to prove that ICWA nonetheless applied, which they failed to do. *In re TM (On Remand)*, 245 Mich App 181, 187; 628 NW2d 570 (2001), overruled on other grounds by *In re Morris*, 491 Mich at 121. As a result, mother has failed to establish plain error.

Affirmed.

/s/ Pat M. Donofrio
/s/ Peter D. O'Connell
/s/ Amy Ronayne Krause